SUPREME COURT, U. S.

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in the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 22

MORTIMER NORMAN KORAN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

BRIEF OF THE RESPONDENT

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MIAMI REVIEW — 371-4853 — 377-3721

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 148

MORTIMER NORMAN KORAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

---

BRIEF OF THE RESPONDENT

OPINIONS BELOW

The opinion of the Third District Court of Appeal of Florida, Third District, is reported at 213 So.2d 735 (3rd D.C.A. Fla., 1969). The opinion of the Supreme Court of Florida is reported at 222 So.2d 26 (Fla., 1969).

JURISDICTION

The respondent would most respectfully point out to this Honorable Court that the question presented by the petitioner raises contentions of alleged violations of his rights under both the Fourth and Fifth Amendments of the Constitution of the United States. The respondent would point out to this Honorable Court that the petitioner did not contend any violation of his rights against self-incrimination as guaranteed him by the Fifth Amendment of the Constitution of the United States in the state trial court proceedings.

The motion to suppress filed by him and appearing in Appendix B of his brief clearly is based solely upon his Fourth Amendment rights to be free of unreasonable searches and seizures. While he generally alleged a violation of his self-incrimination rights under the Fifth Amendment of the United States Constitution on appeal, his brief filed with the District Court of Appeal of Florida, Third District, and contained in the record transferred by that court to this Honorable Court, displays no argument or reliance on such contentions.

Moreover, in as much as this ground was not raised by the defendant in seeking to exclude the evidence in the trial court, it was not properly before the District Court of Appeal of Florida, Third District on appeal. *Shea vs. State*, 167 So.2d 767 (Fla., 1964); *Bertone vs. State*, 224 So.2d 400, (3rd D.C.A. Fla., 1969). As this ground was not properly presented and preserved in the State courts, it is not properly raised at this time. *Cardinale vs. State of Louisiana*, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398, (1969).

QUESTION PRESENTED

The respondent would respectfully rephrase the petitioner's question presented as follows:

> WHETHER THIS COURT WILL REVIEW ON CERTIORARI A DECISION OF THE STATE APPELLATE COURT AFFIRMING A CONVICTION BASED IN PART UPON TAPE-RECORDED CONVERSATIONS WHERE THE JUDGMENT AND SENTENCE WERE ENTERED PRIOR TO THIS COURT'S OPINION IN *KATZ VS. UNITED STATES*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576, (1967)?

STATEMENT OF THE CASE

The petitioner was charged by information in Dade County, Florida, with unlawful possession of counterfeit driver's licenses, in violation of Florida Statute § 322.212 (1). At trial certain tape recordings obtained by the use of electronic surveillance devices were introduced into evidence. One portion of the tape recording played to the jury,

> "had been obtained by an undercover agent, one Rivers, who was wired with a microphone and radio transmitter while conversing with the defendant concerning certain criminal activities. These conversations between the undercover agent and the defendant took place under a bridge in Dade County, Florida. They were transmitted to a building nearby where other

agents recorded the conversations. The tape also consisted of a recording or several telephone conversations between the defendant and Rivers, and was used to corroborate the direct testimony of Rivers." *Koran vs. State*, 213 So.2d 735, 736, (3rd D.C.A. Fla., 1969).

ARGUMENT

THIS COURT WILL NOT REVIEW ON CERTIORARI A DECISION OF THE STATE APPELLATE COURT AFFIRMING A CONVICTION BASED IN PART UPON TAPE-RECORDED CONVERSATIONS WHERE JUDGMENT AND SENTENCE WERE ENTERED PRIOR TO THIS COURT'S OPINION IN *KATZ VS. UNITED STATES*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, (1967).

The petitioner sets forth in his petition a curious "but for" proposition. He argues that his conviction would have been set aside under this Court's holding in *Lee vs. Florida*, 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed.2d 1166, (1968), but for that case's solely prospective application. *Fuller vs. Alaska*, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212, (1969). He further argues that his conviction would have been set aside under this Court's holding in *Katz vs. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, (1967), but for this Court's holding in *Desist vs. United States*, 394 U.S. 224, 89 S.Ct. 1030, 22 L.Ed.2d 248, (1969). The respondent would, however, respectfully submit that regardless of the question of retroactivity, *Lee vs. Florida*, supra, and *Katz vs. United States*, supra,

are not applicable to the instant case and that evidence complained of was legally obtained. *Hoffa vs. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374, (1966); *Lopez vs. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 429, (1966).

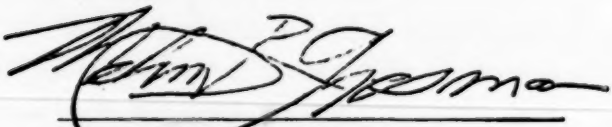
In any event, having duly noted that he is aware of his inability to raise at this time the doctrines established in *Lee vs. Florida*, supra, and *Katz vs. United States*, supra, he then attempts to argue that the use of the recordings in the instant cause to corroborate the testimony of the agent, Rivers, violated his rights against self-incrimination in that it permitted the jury to actually hear a recording of his commission of the offense charged. The respondent would content itself at this point with a reference to the above mentioned fact that this question is not properly before this Court. Moreover, it is firmly established that the right of a defendant to be free of self-incrimination is limited to custodial proceedings and have no applicability to the instant cause. *Miranda vs. Arizona*, 384 U.S. 436, 88 S.Ct. 1602, 16 L.Ed.2d 694, (1966).

CONCLUSION

It is respectfully submitted that the decision of the District Court of Appeal of Florida, Third District, is in complete accord with the applicable decisions of this Court and that the instant petition for writ of certiorari should be denied.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General
Tallahassee, Florida



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IN THE SUPREME COURT OF THE
UNITED STATES

Case No. 148

MORTIMER NORMAN KORAN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

STATE OF FLORIDA :
: SS
COUNTY OF DADE :

AFFIDAVIT OF SERVICE

I, MELVIN B. GROSSMAN, Assistant Attorney General, State of Florida, first being duly sworn according to law, do depose and say:

I HEREBY CERTIFY that three copies of Brief of the Respondent to the Supreme Court of the United States was served upon *H. Robert Koltnow and Gerald Kogan,* Attorneys for Petitioner, 1201 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, by mailing the copies of same to them by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this ____ day of January, 1970.

MELVIN GROSSMAN
Assistant Attorney General

Sworn to and subscribed before me at Miami, Dade County, Florida, this ____ day of January, 1970.

NOTARY PUBLIC
State of Florida at Large
My Commission Expires: